

Decision No. C01-477

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00B-601T

IN THE MATTER OF PETITION OF LEVEL 3 COMMUNICATIONS LLC, FOR
ARBITRATION PURSUANT TO § 252(B) OF THE TELECOMMUNICATIONS ACT
OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH QWEST
CORPORATION.

**DECISION ON APPLICATIONS FOR REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: May 7, 2001

Adopted Date: May 1, 2001

I. BY THE COMMISSION

A. Statement

This matter comes before the Commission for consideration of Applications for Rehearing, Reargument, or Reconsideration ("RRR") to Decision No. C01-312. In that decision, we arbitrated disputes between Level 3 Communications LLC ("Level 3") and Qwest Corporation ("Qwest"), directing the parties to enter into an interconnection agreement consistent with our rulings in the decision. Both Level 3 and Qwest filed applications for RRR. Now being duly advised in the premises, we will deny the application for RRR by Level 3, and grant the application by Qwest, in part only.

B. Discussion

1. Application for RRR by Level 3

a. Level 3 seeks reconsideration of Issue No. 2, whether the parties should be required to compensate one another for the transport and termination of traffic destined for Internet Service Providers ("ISPs"). Issue No. 2 concerns §§ 4.29; 7.3.4.1.3; and 7.3.6 for the proposed interconnection agreement.

b. Level 3 contends that Qwest should be required to pay termination compensation to Level 3 for calls from Qwest end-users to ISPs served by Level 3. On April 27, 2001, the Federal Communications Commission ("FCC") issued its Order on Remand and Report and Order.¹ The Order on Remand establishes certain requirements relating to reciprocal compensation for Internet traffic. The Order on Remand establishes an interim compensation method for ISP-bound traffic through the year 2003. That interim method, in part, sets declining rate caps for compensation paid for ISP traffic; the method also limits the total amount of ISP minutes eligible for reciprocal compensation.

¹ *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 01-131 (2001).

c. The question for the Commission is whether our decision must be modified in response to the FCC's directives concerning reciprocal compensation for Internet traffic. We conclude that the Order on Remand does not compel any change to our initial decision in this case. Our prior decision denied Level 3's request for reciprocal compensation for ISP-bound traffic. Instead, we ordered the parties to exchange ISP traffic on a bill and keep basis. The Order on Remand (paragraph 80) states that it does not intend to preempt state commission arbitration orders that adopt a bill and keep compensation method for ISP traffic.

d. Level 3 contends that we should reconsider our determination that bill and keep should apply to ISP-bound traffic. In particular, Level 3 argues that we erred in adopting a bill and keep mechanism and rejecting its alternative proposal that would provide for the phase-down of reciprocal compensation rates over the term of the interconnection agreement. Level 3 suggests that it is entitled to some form of compensation for the termination of ISP traffic, either at the current reciprocal compensation rate or the proposed "phased-down" rate. The FCC, Level 3 contends, contemplates some form of compensation for Internet traffic; bill and keep is not a form of compensation.

e. Level 3 then contends that it will not be able to recover its costs for terminating ISP-bound traffic

under bill and keep, because none of the alternative cost recovery options suggested by the Commission will realistically compensate it for the costs it incurs in terminating Internet traffic originated by Qwest's customers. Once again, the application for RRR states that ISP-bound traffic is local traffic, not long-distance, and should be treated as any other local call subject to reciprocal compensation.

f. According to the application for RRR, there is no evidence in this proceeding that adopting some form of reciprocal compensation for ISP traffic will result in inappropriate subsidies. Specifically, Level 3 contends that Qwest did not offer any cost studies or other evidence that non-Internet users subsidize Internet users. Moreover, Level 3 states, it does not serve ISPs because reciprocal compensation provides an "unintended arbitrage opportunity." Rather, it focused on serving web-based companies (not just ISPs) for its initial offerings and, over time, it intends to offer additional services.

g. The application for RRR further suggests that there is no evidence that either Qwest or Level 3 can identify ISP-bound calls. And requiring Level 3 to make this determination is the equivalent of asking it to manage Qwest's network.

h. Level 3 contends that its alternative proposal to "phase-down" the payment of reciprocal compensation

over the life of the interconnection agreement is a market-based, pro-competitive compensation mechanism that incents it to originate local traffic. That most incumbent local exchange carriers are entering into some form of agreement where reciprocal compensation is "phased-down" over the life of the interconnection agreement indicates that this is the type of agreement that Level 3 would reach with Qwest in the competitive marketplace.

i. We will deny Level 3's application for RRR. Decision No. C01-312 addressed all arguments Level 3 raises in its application. As we stated in our decision, we should move toward an arrangement in which each telecommunications firm provides its chosen array of services, incurs the costs of doing so, and covers those costs through rates charged to its own customers. Reciprocal compensation at a positive rate violates the economic principle that a proper price signal requires that the end-user be charged a price equal to the marginal cost of service.² This principle requires that the end-user pay a price for Internet service that reflects all incremental costs including the cost of transporting the call to the ISP. While

² Such a price signal allows the end-user to accurately compare the benefits of acquiring another unit of the product to the costs of acquiring another unit. It also properly signals incumbent local exchange carriers and competitive local exchange carriers with respect to the relative benefit of deploying their capital to serve ISPs versus serving other potential customers.

not perfect, a bill and keep mechanism properly focuses on the need for various networks to interconnect, but requires each carrier to recover its costs through charges imposed on its own customers. We believe that such an approach is the best way to encourage greater, more seamless interconnection in the future.

j. With respect to Level 3's contention that it will be unable to recover its costs for terminating ISP traffic under bill and keep, we reiterate that Level 3's options are not as limited as it indicates. With respect to the contention that there is no evidence that either Qwest or Level 3 can identify ISP-bound calls, we refer to page 21 of the decision and remind Level 3 that any problems that may arise in the call identification process can be addressed through the dispute resolution process included in the interconnection agreement, or a request can be made for modification of the interconnection agreement.

k. Level 3 also seeks reconsideration of our decision on Issue No. 6 to exclude Internet related traffic when determining relative use of direct trunk transport ("DTT") and entrance facilities ("EF"). Issue No. 6 concerns provisions 7.3.1.1.3.1 and 7.3.2.2 in the proposed interconnection agreement.

l. Level 3 contends that we ignored a recent FCC decision ("TSR Wireless decision")³ and Commission Rule 4 *Code of Colorado Regulations* ("CCR") 723-39-3.5 when determining that Internet traffic should not be included in the calculation of relative use of DTT and EF. Level 3 also asserts that we improperly tied our decision on financial responsibility for DTT and EF for handling Internet related traffic to our decision on reciprocal compensation for terminating ISP-bound traffic.

m. Decision No. C01-312 did not specifically discuss each and every argument made in Level 3's filings. Nevertheless, we considered the full record and all arguments, including the TSR Wireless decision, in our initial decision. We also disagree with Level 3 that Commission Rule 4 CCR 723-39-3.5 addresses *financial* responsibility for facilities between parties. Rule 4 CCR 723-39-3.5 states that each carrier is responsible for constructing and maintaining facilities on its side of the point of interconnection. Financial responsibility is addressed in Rules 4 CCR 723-39-3.3.4 and 4 CCR 723-39-3.4.

n. Our decision to exclude Internet related traffic when determining relative use of DTT and EF, does not improperly rely on our decision on reciprocal compensation for

³ *TSR Wireless v. US West Communications, Inc., et al.*, FCC 00-194 (Rel. June 21, 2000).

termination of ISP-bound traffic. Given the simple choice of including or excluding Internet traffic and the limited context of this proceeding, our decision is to exclude such traffic for the reasons set forth in Decision No. C01-312. We deny Level 3's request for reconsideration.

2. Application for RRR by Qwest

a. Qwest seeks reconsideration of the Commission's decision on Issue No. 3 concerning provisions 4.39 and 4.58 in the interconnection agreement. Specifically, Qwest requests that the portion of Decision No. C01-312 relating to Issue No. 3 be withdrawn. Issue No. 3 relates to the treatment of phone-to-phone Internet protocol telephony ("IP telephony") in the interconnection agreement. Decision No. C01-312 essentially adopts Level 3's position on this question. On March 28, 2001, the parties filed their Stipulated Notice of Parties' Negotiated Resolution of Issue Number 3--Voice over IP Telephony. That notice informed the Commission that Level 3 and Qwest had agreed to specific language relating to this issue for inclusion in the interconnection agreement. Decision No. C01-312 did not reflect the parties' agreement in the Stipulated Notice.⁴

⁴ The Stipulated Notice was filed on March 28, 2001; Decision No. C01-312 was issued on March 30, 2001. However, the Commission's oral decision in this case occurred at the March 16, 2001 Deliberations Meeting.

b. In its application for RRR, Qwest suggests that the Commission must withdraw that portion of Decision No. C01-312 relating to IP telephony. Qwest reasons that given the parties' agreement in the Stipulated Notice, Issue No. 3 was no longer in dispute. Citing 47 U.S.C. subsections 252(a)(1), (b)(1), and (b)(4), Qwest contends that the Commission's arbitration authority is limited to issues still in dispute between the parties to the proceeding. Inasmuch as the parties agreed on language concerning Issue No. 3, Qwest suggests that we withdraw that portion of Decision No. C01-312 concerning IP telephony. We disagree with these suggestions.

c. Section 252 limits state commission arbitration authority to those issues in dispute between parties *as of the time of the filing of the petition for arbitration and the response to the petition.* The manner of treating IP telephony in the Level 3/Qwest interconnection agreement was put at issue in the petition for arbitration and the response in this case. Therefore, the Commission did have authority to address this question in Decision No. C01-312, notwithstanding the Stipulated Notice. For this reason, we reject Qwest's request that we "withdraw" any portion of the decision.⁵

⁵ Parties seeking to preclude a Commission decision on an issue in an arbitration case should timely resolve their dispute and inform the Commission of that resolution.

d. This does not mean we reject the language agreed to by the parties subsequent to our March 16, 2001 oral deliberations. We have a strong preference for voluntarily negotiated interconnection agreements. Therefore an agreement including either the language approved by the Commission in Decision No. C01-312, or the language agreed to by the parties in the Stipulated Notice is acceptable. Because Decision No. C01-312 essentially adopts Level 3's position on this matter, Level 3 shall have the option of selecting which language is included in the interconnection agreement submitted to the Commission for approval. Therefore, we grant, in part, Qwest's request for reconsideration.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration by Level 3 Communications, LLC is denied.

2. The Application for Rehearing, Reargument, or Reconsideration by Qwest Corporation is granted in part only, and is otherwise denied.

3. The 20-day period provided for in § 40-6-114, C.R.S., within which to file further applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
May 1, 2001.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER POLLY PAGE
NOT PARTICIPATING.